Kirby Gordon v. EMC Mortgage Corp. CV 09-0432

Kirby Gordon (Plaintiff) alleges that EMC Mortgage Corp. (EMC) and JP Morgan Chase (Chase) (collectively Defendants) agreed to modify the rate of interest on his loan obligation upon his providing three consecutive modified monthly loan payments. As an exhibit to the complaint, Plaintiff attaches a solicitation from Chase that states: "Instead of facing foreclosure, if these homeowners who are experiencing financial hardship make three modified mortgage payments in full and on time, they will earn a permanent modification." Plaintiff alleges that he authorized Defendants to withdraw from his bank account monthly payments of $5,742 for the months of June, July and August 2008, but that Defendants thereafter refused to modify the interest rate on his loan.

The original complaint pled causes of action for breach of contract, declaratory relief, injunctive relief, unfair business practices and breach of the covenant of good faith and fair dealing. Defendants successfully demurred to the earlier complaint. Plaintiff's Second Amended Complaint (SAC) contains causes of action for breach of contract, promissory estoppel, declaratory relief, temporary restraining order, unfair business practices and breach of the implied covenant of good faith and fair dealing. Defendants now demur to the fourth cause of action for violation of the unfair business practices act. Plaintiff opposes the demurrer.

Chase once again argues that Plaintiff has no standing to pursue any claims against Chase because Chase had no involvement with the property or the loan. Like the original complaint, the SAC alleges that each defendant was the associate, partner, agent, subsidiary or employee of each other, and that they were acting in that scope and with the knowledge, consent and ratification of the others. Additionally, the SAC alleges that, by reason of merger, EMC is a wholly owned subsidiary of Chase to the extent that there exits a unity of interest between EMC and Chase. Consistent with the Court's ruling on the prior demurrer, these allegations are sufficient to maintain an action against Chase.

With regard to Plaintiff's unfair business practices claim, the Court sustained Defendants' original demurrer because the complaint failed to allege how Defendants' conduct was unlawful, unfair or fraudulent. The unfair competition law, Bus. & Prof. Code § 17200 et seq., prohibits "anything that can properly be called a business practice and that at the same time is forbidden by law." *Albillo v. Intermodal Container Services, Inc.* (2003) 114 Cal.App.4th 190, 206. Therefore, to state a valid claim, a plaintiff must establish that the practice is either unlawful (i.e., is forbidden by law), unfair (i.e., harm to victim outweighs any benefit) and/or fraudulent (i.e., is likely to deceive members of the public). (*Id*)

Chase again claims that the SAC fails to allege violation of an underlying law, the spirit or policies of antitrust law, or that its practices are fraudulent. The Court disagrees. Whereas the original complaint alleged that Defendants unfairly refused to modify Plaintiff's loan, the SAC alleges that Defendants engaged in a pattern of conduct business acts that are forbidden by California law. More specifically, Plaintiff contends that Defendants are falsely advertising that they will make loan modifications permanent after

receiving three months of trial modification payments. Plaintiff concludes that Defendants are not abiding by the representation and are inducing borrowers into making trial modification payments. An allegation that Defendants are deceiving the public by falsely representing that they will modify a loan upon completion of the trial modification period is sufficient to state a cause of action for unfair business practices.

Defendants' demurrer is overruled. They shall answer the complaint within 20 days.